FILED
NOV 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7194

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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On Behalf of Amicus Curiae
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QUESTION PRESENTED

WHETHER BURGLARY (REGARDLESS OF ITS STATE LAW DEFINITION) IS A "VIOLENT FELONY" AS THAT TERM IS USED IN 18 U.S.C. 924(e)(2)(B)?

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STATEMENT OF INTEREST

OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia Non-Profit Corporation with a nation-wide membership of more than 5,000 lawyers. The NACDL was founded over 25 years ago to advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. A cornerstone of this organization's objectives, and of the criminal justice system, is the consistent application of federal criminal statutes. The NACDL is very concerned about the conflict among the circuits, as indicated in this case, which undermines the organization's objectives and creates serious constitutional questions. Furthermore, the varying applications

of the enhancement statute in question results in disparity in sentencing thereby undermining the objectives of the new Sentencing Guidelines. This brief supports the petitioner's arguments that the decision below should be reversed and remanded for resentencing.

Both parties have consented to the filing of this Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals should not have affirmed the enhancement of petitioner's sentence without first determining whether petitioner's prior burglary convictions constituted "violent felonies" as that term is used in 18 U.S.C. § 924(e)(2)(B). In holding that Congress meant that any burglary, regardless of its definition or denomination by a state legislature was a "violent felony", the Court changed the meaning of conduct specifically addressed by the states. The district court, at sentencing, should have required the government to prove by a preponderance of the evidence that petitioner's prior burglary conviction was a crime of violence or one in which there was a serious potential risk of injury to another.

ARGUMENT

NOT EVERY BURGLARY IS A "VIOLENT FELONY" AS THAT TERM IS USED IN 18 U.S.C. § 924(e)(2)(B).

Petitioner pleaded guilty to possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). The government sought enhancement of petitioner's sentence under 18 U.S.C. § 924(e)(1) inasmuch as petitioner had two previous convictions for second degree burglary under Missouri state law, one previous state conviction for robbery and two previous state convictions for assault. At sentencing the government agreed with petitioner that one of the two state assault convictions should not be considered relative to enhancement since that conviction had not been verified.

Petitioner conceded that his robbery conviction and the remaining assault conviction each qualified as a "violent felony" under the enhancement provisions. Petitioner contended at the sentencing hearing that his two burglary convictions were not proper predicate offenses under § 924(e)(1) and § 924(e)(2)(B)(ii) because those crimes did not involve actual or potential injury to others.

It is not clear from the record what petitioner's conduct was that resulted in his state burglary convictions. He was convicted in 1963 and the government's notice of enhancement stated only that he had been convicted of burglary in the second degree under Missouri law without specifying circumstances of the crime. In 1963, at the time of his conviction, there were seven separate Missouri statutes describing conduct which could be burglary in the second degree. The conduct described varied from

breaking into an unoccupied dwelling house (§ 560.045), breaking out of a dwelling house (§ 560.050), breaking an interior door (§ 560.055), burglary after being admitted with consent (§ 560.060), breaking and entering enclosures besides dwelling places (§ 560.070), breaking into a bank building (§ 560.075) and breaking and entering into vacant buildings (§ 560.080). There was a separate statute for burglary in the first degree (§ 560.040) and burglary with explosives (§ 560.100).

Regardless of the statute under which petitioner was convicted for second degree burglary, it is the position of the amicus that by the language of 18 U.S.C. § 924(e)(1) the government should have the burden of proof by a preponderance of the evidence of showing that the conduct in which the petitioner engaged was violent. Given the varieties of conduct which could constitute burglary in Missouri, without

even considering the numerous categories established by the other states, simply restating the fact of conviction should not be allowed to support enhancement of a sentence. It is for this reason that United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), cert. den'd, 109 S.Ct. 2073 (1989), the Eighth Circuit opinion in this case, and United States vs. Dickerson, 857 F.2d 414 (7th Cir. 1988) are wrong. These cases assume that all burglaries involve conduct "that presents a serious potential risk of physical injury to another." This assumption cannot be supported, as demonstrated by the Missouri statutes. This approach is far too simplistic.

The Fourth Circuit has enunciated the rule in United States vs. Headspeth, 852 F.2d 753, 757-8 (4th Cir. 1988) that "burglary" as used in 18 U.S.C. § 924(e)(2)(B)(ii) means only burglary as it was defined at common law; that is, the breaking and entering of the dwelling house of

another, in the nighttime, with the intent to commit a felony therein. Obviously this definition does not include any commercial burglary and various other conduct. We believe that 18 U.S.C. § 924(e)(2) is not so restrictive.

The Eleventh Circuit, in United States vs. Hill, 863 F.2d 1575 (11th Cir. 1989) has held that burglary means "any felony consisting of entering or remaining surreptitiously within a building which is the property of another with intent to engage in conduct constituting a Federal or State offense." Id at 1578. Thus, the Eleventh Circuit's definition mirrors the common law definition except that it broadens it to include the term "building" rather than just "dwelling house". This holding is too broad because it could enhance a defendant's sentence for conduct which was not violent. Furthermore, that court adopted a definition of burglary specifically abandoned by

Congress. Hill, supra at 757-58. "Burglary" is not defined in 18 U.S.C. § 924(e).

In United States vs. Sherbondy, 865 F.2d 996 (9th Cir. 1988) the Ninth Circuit opted for a compromise and held, similarly to United States vs. Portwood, supra, that Congress meant to include certain categories of crimes, regardless of their various definitions, and that criminal conduct not within one of those categories should be examined by the sentencing court to determine whether or not the applicable state statute covered only conduct that was "otherwise violent". In other words, if a state statute covered conduct outside of one of the categories listed in § 924(e)(2)(B)(ii) (burglary, arson, extortion) that could be criminal whether it was violent or not violent, a conviction under that statute could not serve as the basis of enhancement because the state statute would be overly broad. Id. at 1011.

Amicus respectfully submits that the analyses applied in the above cases from the various circuits does not accomplish what congress admittedly intended; that is, to enhance punishment for persistently violent or drug offenders. No matter how carefully one wants to review the legislative history of § 924 (Cf. United States vs. Hill, supra; United States vs. Sherbondy; supra; and United States vs. Taylor, 864 F.2d 625 (8th Cir. 1989) (Bright, J., dissenting) it is clear that Congress wanted longer sentences imposed upon those persons previously engaged in a number of crimes of violence, crimes where there was a serious potential risk of injury to another, serious drug crimes, or any combination of the three. That being the case, and more particularly concerning the facts in this case, we submit that the sentencing court should determine in what violence, if any, the petitioner engaged so that it

can properly make its determination as to whether or not to enhance punishment. Consequently, we respectfully submit that a holding by this Court that at sentencing, the burden of proof is on the government to show by a preponderance of the evidence that the underlying conviction(s) is one of violence or one in which there was a serious potential risk of injury to another, or was a serious drug offense, regardless of how the state characterizes or labels the offense, meets the intent of congress and provides petitioner the opportunity to a fair hearing on substantial issues and ensures the protection of due process of law.

Such a holding will not overburden the courts nor cause any calamity within the judicial system. Indeed, such a process is not even novel. Rather, requiring this kind of determination to be made by the district court is entirely consistent with the many kinds of hearings now held for sentencings. Cf. United

States vs. Baskin, 886 F.2d 383 (D.C. Cir. 1989). Mini-trials would not be required as the government may be able to show that the statute under which a defendant was convicted criminalized only violent conduct. Coupled with the fact of conviction the requirements of §924(e)(2)(B) would be met. Admittedly, in some cases more would have to be shown by the government. However, this is not a heavy burden given that the government is seeking a mandatory minimum, non-parolable fifteen year sentence.

CONCLUSION

For the foregoing reasons and authorities in support thereof, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed and this cause be remanded the United States District Court for the Eastern District of Missouri, Eastern Division, for resentencing in accordance with the position of the Amicus Curiae expressed herein.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I BURTON H. SHOSTAK, a member of the Bar of this Court, being first duly sworn under oath declare that the 40 copies of the foregoing Amicus Curiae Brief were served by depositing them in a United States mailbox with first class postage prepaid, addressed to Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; and that at the same time three copies were placed in the same mailbox postage prepaid and addressed to Bruce David Livingston, Esq., Attorney for Arthur LaJuane Taylor, 100 North Broadway, Suite 2000, Suite 2000, St. Louis, Missouri 63102, and Kenneth W. Starr, Esq., Solicitor General, United States Department of Justice, Washington D.C. 20530, Attorney for Respondent. Affiant swears that this Amicus Curiae Brief was deposited by affiant in the mailbox located at the Clayton Branch Post Office in the City of St. Louis, Missouri on November 24, 1989

Burton H. Shostak

SUBSCRIBED AND SWORN TO before me this 24th day of November, 1989.

Notary Public

MY COMMISSION EXPIRES:

NOTA[illegible]

MY C[illegible]